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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

KION TYRELL STREETER,

Defendant and Appellant.

E069982

(Super.Ct.Nos. FWV17003264 &
FWV17003263)

ORDER MODIFYING OPINION
AND DENYING PETITION FOR
REHEARING

[NO CHANGE IN JUDGMENT]

THE COURT:

The Petition for rehearing filed by appellant on June 18, 2019, is denied. The opinion filed in this matter on June 18, 2019, is modified as follows:

1. On page 25, in the third line from the top of the page, change “(See § 1204.4, subd. (b).)” to “(See § 1202.4, subd. (b).).” The footnote remains the same.
2. On page 28, after the first full paragraph and before “IV. DISPOSITION,” add the following Section C:

C. Any Dueñas Error for Streeter Was Harmless Beyond a Reasonable Doubt

Following the issuance of our original opinion in this appeal on June 18, 2019, Streeter petitioned for rehearing, claiming his \$120 court operations assessment fee (Pen. Code, § 1465.8) and his \$90 court facilities assessment fee (Gov. Code, § 70373) must be reversed because the trial court did not hold an “ability to pay” hearing before it imposed these fees. Additionally, he claims his \$1,950 restitution fine (Pen. Code, § 1202.4) must be stayed unless and until the People can prove he has the present ability to pay this fine.

Although Streeter claims that only \$210 in court operations and court facilities assessment fees were imposed, the record on appeal (the reporter’s transcript of Streeter’s original sentencing hearing) shows that the court imposed these fees “per conviction,” as the court was statutorily required to do. (Pen. Code, § 1465.8; Gov. Code, § 70373.) Accordingly, the court actually imposed court facilities assessment fees totaling \$270 (3 times \$90) and court operations assessment fees totaling \$360 (3 times \$120), or total fees of \$630 (3 times \$210).

As support for his claims of error, Streeter relies on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), where the court held that due process requires the court to hold an ability to pay hearing before it may impose court operations or facilities assessment fees (*Id.* at pp. 1164-1169) and that courts must impose but stay the execution of a restitution fine “unless and until the People prove” that the defendant has the ability to pay the fine. (*Id.* at pp. 1169-1172.)

The People argue Streeter has forfeited his claims of *Dueñas* error because he did not object when the trial court failed to conduct an ability-to-pay hearing before it imposed the fees and the fine. Streeter also failed to ask the court to conduct an ability to pay hearing or to determine his ability to pay either the fees or the fine.

It unnecessary for this court to determine whether Streeter has forfeited his claims of *Dueñas* error because the record unequivocally shows that any trial court error in failing to determine Streeter’s ability to pay the fees and the restitution fine was harmless beyond a reasonable doubt. (*People v. Jones* (June 28, 2019) ___ Cal.App.5th ___ (2019 Cal.App. Lexis 597 at *11-13; *People v. Johnson* (2019) 35 Cal.App.5th 134, 139-140; *Chapman v. California* (1967) 386 U.S. 18, 24.) That is, the record shows Streeter *had and still has the ability to pay* the challenged assessment fees totaling \$630 and the (reduced) \$1,950 restitution fine.

At Streeter’s original sentencing hearing on February 2, 2018, the trial court found Streeter had the “ability to pay” two items: (1) \$750 in appointed counsel fees; and (2) \$727 for the cost of conducting the presentence investigation and preparing the probation report. (§ 1203.1, subd. (b).) Indeed, Streeter’s probation report shows he was employed by Home Depot for three years preceding his arrest on his current charges; he had a “[f]orklift license;” he was 29 years old; and his health was “[e]xcellent.” And, given Streeter’s young age and excellent health, there is no reasonable doubt that he has the ability to earn wages while in prison and following his release from prison—sufficient to pay the challenged assessment fees of \$630 and the challenged restitution fine of \$1,950. (See *People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837 [a defendant’s ability to pay includes the defendant’s ability to earn wages while in prison *and* following the defendant’s release from prison]; see also *People v. Castellano* (2019) 33 Cal.App.5th 485, 490.)

Thus, even if Streeter suffered a due process violation or *Dueñas* error when the court imposed the assessment fees and restitution fine at sentencing, without determining whether Streeter had the ability to pay the fees and fine, the error was harmless beyond a reasonable doubt. (*People v. Johnson, supra*, 35 Cal.App.5th at pp. 139-140; *People v. Jones, supra*, 2019 Cal.App. Lexis 597 at **11-13.) We therefore reject Streeter’s claims of *Dueñas* error on the ground that Streeter has not met his burden of showing he was prejudiced by the error. (*People v. Jones, supra*, at **11-12.)

3. On page 28, under “IV. DISPOSITION,” in line 3 of the first paragraph, strike the citation “(§§ 12024, subd. (b), 1202.45, subd. (a),” and replace it with “(§§ 1202.4, subd. (b), 1202.45, subd. (a).)”

4. On page 28, in line 2 of footnote 14, after “discretionary,” change “section 1204.4, subdivision (b)” to “section 1202.4, subdivision (b).”

Except for these modifications, the opinion remains unchanged. The modifications do not effect a change in the judgment.

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FIELDS

J.

We concur:

CODRINGTON

Acting P. J.

RAPHAEL

J.

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

KION TYRELL STREETER et al.,

Defendants and Appellants.

E069982

(Super.Ct.Nos. FWV17003264 &
FWV17003263)

OPINION

APPEAL from the Superior Court of San Bernardino County. Charles J. Umeda, Judge. Affirmed in part with directions; reversed in part.

Aaron J. Schechter, under appointment by the Court of Appeal, for Defendant and Appellant Kion Tyrell Streeter.

William G. Holzer, under appointment by the Court of Appeal, for Defendant and Appellant Geovanni Malik Patterson.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Steve Oetting and Paige B. Hazard, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendants and appellants, Kion Tyrell Streeter and Geovanni Malik Patterson, were charged in the same information and tried before the same jury for several crimes stemming from a police pursuit of a vehicle, which Streeter was driving and in which Patterson was the front seat passenger. The vehicle crashed and both defendants attempted to flee from the scene on foot, but both were quickly apprehended. A firearm was found in Streeter's waistband, and a second firearm was found on the vehicle's driver's seat.

Each defendant was charged with active gang participation (Pen. Code, § 186.22, subd. (a); count 1), with carrying a concealed firearm in a vehicle (Pen. Code, § 25400, subd. (a)(1); count 2), and, in separate counts, with possessing a firearm as a felon (Pen. Code, § 29800, subd. (a)(1); count 3 [Streeter]; count 4 [Patterson]). Streeter was also charged with evading a police officer with wanton disregard for safety. (Veh. Code, § 2880.2, subd. (a); count 5.) It was further alleged that counts 2 through 5 were committed for the benefit of a criminal street gang. (Pen. Code, § 186.22, subd. (b).)¹

The jury found Patterson guilty *only* of active gang participation and not guilty of the other charges against him—carrying a concealed firearm in a vehicle and possessing a

¹ Undesignated statutory references are to the Penal Code.

firearm as a felon. The jury found Streeter not guilty of active gang participation but guilty of the other charges against him—carrying a concealed firearm in a vehicle, possessing a firearm as a felon, and evading a police officer. The jury also found each gang allegation not true. The jury found Patterson had a first degree residential burglary conviction (§ 459), which was both a prior strike (§ 667, subds. (b)-(i)) and a prior serious felony conviction (§ 667, subd. (a)).

Patterson was sentenced to 11 years in state prison—the upper term of three years on count 1, doubled to six years based on his prior strike, plus five years for his prior serious felony conviction. Streeter was originally sentenced to four years four months in state prison on counts 2 and 3, including an eight-month term on count 5, but his sentence was modified to three years eight months in state prison on counts 3 and 5, plus a concurrent 365-day jail term on count 2, after the court determined that count 2 should have been treated as a misdemeanor.

In this appeal, Patterson claims (1) insufficient evidence supports his active gang participation conviction and (2) the matter must be remanded so the court may consider whether to exercise its discretion to strike or dismiss his prior serious felony conviction for sentencing purposes, in light of the recent enactment of Senate Bill No. 1393. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971-974.)

We conclude insufficient evidence supports Patterson’s active gang participation conviction. Thus, we reverse the judgment against Patterson, and it is unnecessary to

remand the matter for the court to consider whether to strike or dismiss Patterson's prior serious felony conviction for sentencing purposes.

Streeter raises two claims of sentencing error—first, that the court erroneously failed to stay the lesser term on his two firearm convictions in counts 2 and 3 (§ 654), and second, that his \$4,500 restitution fine and corresponding \$4,500 parole revocation fine (§§ 1202.4, subd. (b), 1202.45, subd. (a)) must be reduced to \$1,800 each in light of his resentencing on count 2. He also claims his defense counsel rendered ineffective assistance in failing to ask the court to reduce the fines at resentencing.

We reject Streeter's section 654 claim. Separate terms were properly imposed on Streeter's firearm convictions in counts 2 and 3 because substantial evidence supports the trial court's implied finding that each count was based on Streeter's possession of a different firearm. We agree, however, that Streeter's ineffective assistance claim has merit, and we reduce his restitution and parole revocation fines to \$1,950, but not to \$1,800. We affirm the judgment against Streeter in all other respects.²

² Streeter has petitioned for a writ of habeas corpus in case No. E070645, claiming, as he does in this appeal, that his defense counsel rendered ineffective assistance of counsel in failing to ask the court to reduce his \$4,500 restitution and parole revocation fines when it resentenced Streeter on count 2. We previously ordered the writ petition considered with this appeal. Because Streeter raises a virtually identical ineffective assistance claim in this appeal and we agree his appellate claim has merit, we deem his writ petition moot, and we deny it by separate order.

II. FACTS AND PROCEDURE

A. *Prosecution Evidence*

1. The Police Pursuit

On August 19, 2017, City of Rialto Police Officers Mike Martinez and Jacob Medina were in uniform and on patrol in a marked police car, when they noticed a dark-colored BMW, without a front license plate, driving 10 miles over the speed limit in a residential area. Streeter and Patterson were later identified as the BMW's driver and front seat passenger, respectively. The officers were unable to see inside the BMW because its windows were tinted.

The officers followed the BMW, activated their lights and siren, and attempted to conduct a traffic stop, but the BMW did not stop. Instead, the BMW accelerated, ran one stop sign and multiple red lights, crossed into oncoming traffic, and traveled at speeds of up to 80 to 100 miles per hour. The BMW crashed into a curb on Pepper Avenue after its driver lost control as the BMW crossed over a set of train tracks.

Three to five seconds after the crash, Patterson got out of the BMW's passenger side and ran away. A few seconds later, Streeter got out of the BMW and also attempted to flee, but one of the officers, using his Taser, apprehended Streeter after Streeter did not comply with orders to stop and get on the ground. At the scene, Officer Medina recognized Streeter as a No Cutz gang member from previous contacts the officer had with Streeter.

Streeter had a Ruger LCP .380 subcompact firearm in his waistband. Another firearm, a nine-millimeter Ruger P95, was found on the driver's seat of the BMW. Both firearms were loaded and appeared operable. No fingerprints were recovered from either firearm.

Patterson was found hiding behind a cinder block wall approximately 300 yards from the crashed BMW. Patterson was not wearing any shoes, but a blue and white Adidas shoe was found near where Patterson had been hiding, and a matching shoe was found on the ground outside the BMW's passenger door. Patterson's backpack, which included his California identification card, was found on the floorboard of the BMW's front passenger area. No firearm-related items, including ammunition, were found in Patterson's backpack.

2. Gang Evidence

(a) *Percipient Gang Testimony*

On August 2, 2014, three years before the police pursuit, Rialto Police Officer Anthony Glass contacted Patterson in a Rialto park. The officer completed a gang identification card on Patterson, documenting that Patterson had a "400" tattoo on his left shoulder and a "Cut Alone Cut Strong" tattoo on his right forearm—tattoos associated with the No Cutz criminal street gang. At the police station later that day, Patterson spontaneously said "No Cutz" and flashed a No Cutz gang sign. When he said "No Cutz" and flashed its gang sign, it "almost appeared" as though Patterson was "bragging." Consequently, on the gang card, Officer Glass documented Patterson as a

“[s]elf-admitted” No Cutz gang member. Officer Glass then asked Patterson to sign the gang card, and Patterson did so.³ Patterson did not say anything like “I’m a member of No Cutz,” and he was not specifically asked whether he was a No Cutz gang member. But in Officer Glass’s experience, nongang members do not “represent[]” gangs they are not from because “there could be consequences” from the gang’s “actual members.”

On October 9, 2014, Officer Nicholas Parcher observed Patterson rolling dice outside of a business with several other No Cutz gang members. At the time, Officer Parcher observed a “Cut Alone Or Cut Strong” tattoo on Patterson’s forearm. Officer Parcher had previously contacted Patterson and knew him to be a No Cutz gang member, but on October 9, 2014, Patterson did not admit gang membership.

(b) Officer Medina’s Expert Gang Testimony

Officer Medina testified as an expert on the No Cutz criminal street gang. The gang was established in 2003, was active in the City of Rialto, and had around 50 members. The gang was associated with the 400 block of West Jackson Street and its territory included Pepper Avenue, where the police pursuit occurred. The gang’s members were known to wear Cincinnati Reds and North Carolina Tar Heels apparel. The gang’s sign resembled a horizontal peace sign and was formed with the index finger, middle finger, and thumb.

The No Cutz gang’s primary activities included robberies, burglaries, shootings, assaults with deadly weapons, possessing narcotics for sale, and unlawfully possessing

³ The gang card was not admitted into evidence.

firearms. In addition, several No Cutz gang members had criminal convictions (i.e., predicate offenses, indicating a pattern of criminal gang activity): Streeter had a 2008 conviction for assault by means of force likely to produce great bodily injury; Patterson had 2015 convictions for first degree residential burglary and unlawfully taking a vehicle; James Comminey and Bryan Johnson each had 2014 convictions for possessing a loaded firearm as a gang member; Samuel Lomeli had a 2015 conviction for possessing a firearm as a felon; and Robert Williamson had a 2015 carjacking conviction.

Officer Medina opined that Patterson and Streeter were active No Cutz gang members at the time of the August 19, 2017, police pursuit. The officer based this opinion on several factors, including that Patterson and Streeter each had No Cutz gang tattoos.⁴ In the gang culture, nongang members are not allowed to have gang-related tattoos or to flash a gang's signs without suffering adverse "consequences" from the gang. In addition, in music videos posted on YouTube, Patterson and Streeter were flashing No Cutz gang signs in the presence of and with other No Cutz gang members, and Streeter was heard promoting violence against rival gang members.⁵

⁴ Patterson's gang-related tattoos included "Rialto," Inland Empire," "NFL" (meaning No Cutz for Life), "Cut Alone Or Cut Strong," "Jackson" and "Lilac" (referring to the gang's territory), "~~HSK~~" (representing animosity toward the rival gang Hustler Squad), "~~NLK~~" (representing animosity toward the rival gang No Love), and dice showing the number 4, and 400, referring to the 400 block of West Jackson, part of the gang's territory. Streeter had an "NC" tattoo on his abdomen, and "400" poker chip tattoo on his forearm.

⁵ In a YouTube-posted music video titled "What you Need," Patterson, Streeter, and No Cutz gang members flashed No Cutz gang signs, Patterson was wearing an "NCG" sweater referring to the No Cutz gang, and Streeter was holding a firearm.

Officer Medina opined that Patterson and Streeter committed the crimes of carrying a concealed firearm in a vehicle and evading the police “for the benefit of” and “in association with” the No Cutz gang. (§ 186.22, subd. (b).) The officer explained that having a concealed firearm in a vehicle, in the gang’s territory, benefited the gang because it made the firearm “readily available” for the gang’s use, if needed. The concealment of the firearm was also “in association with the gang” because two of the gang’s members committed the crime “with one another.” Evading the police benefited the gang because word of such an incident “gets around” and enhances the gang’s reputation by showing that its members are “willing to possess these firearms, they’re willing to flee from police, commit these crimes and not comply with orders.”

In response to a hypothetical question based on the circumstances of the police pursuit, Officer Medina further opined that the BMW’s passenger, by attempting to flee on foot, specifically intended to promote, further, or assist in the perpetration of felonious criminal conduct by gang members. (§ 186.22, subd. (a).) The officer explained that the passenger, a gang member, would have known there was a firearm in the vehicle and

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Streeter also appeared in two other YouTube-posted music videos titled “Rialto” and “Rialto Twist.” In the Rialto video, Streeter flashed No Cutz gang signs and made statements warning rival gang members not to come into No Cutz territory or they would be shot. In the Rialto Twist video, Streeter, in the company of No Cutz gang members, displayed a No Cutz gang sign and talked about No Cutz members being “active” in the 400 block of West Jackson Street. Firearms were also displayed in the Rialto and Rialto Twist videos.

would have intentionally “assisted in the crime” of possessing that firearm by fleeing the scene and getting away.

Officer Medina acknowledged that neither Patterson nor Streeter were wearing gang-related clothing at the time of the police pursuit, and that no gang-related clothing or paraphernalia were found in the BMW. And, in a search of Streeter’s home following the police pursuit, officers found no guns, narcotics, or gang-related paraphernalia.

B. Defense Evidence

From approximately 2:00 p.m. to 9:00 p.m. on August 19, 2017, Streeter’s sister-in-law, I.G., was at a family gathering in San Bernardino with her sister (Streeter’s wife) and Streeter. At the gathering, I.G. saw Streeter drinking Hennessey, but she did not see how much alcohol Streeter drank that day. I.G. lived in the same home with Streeter and Streeter’s wife, and their home was only around “eight minutes” away from the family gathering.

Around 9:00 p.m., I.G. left the family gathering with Streeter’s wife and, at the same time, Streeter and Patterson left in another vehicle. I.G. initially followed Streeter’s car but lost sight of it when she stopped at a red light. As I.G. was almost at the home she shared with Streeter’s wife and Streeter, she saw that the police had intercepted Streeter’s car not far from his home.

In closing argument, Streeter’s counsel relied partly on I.G.’s testimony in arguing that Streeter did not commit any gang-related crimes. Counsel argued Streeter was “on his way home” when the police pursued him, and suggested that Streeter evaded the

police and tried to flee—not because he had just committed any gang-related crimes—but because he had a prior felony conviction and *might* have had a gun in his waistband, and he simply “got caught before he got home.”

III. DISCUSSION

A. *Insufficient Evidence Supports Patterson’s Active Gang Participation Conviction*

Patterson claims insufficient evidence supports his conviction for active gang participation. (§ 186.22, subd. (a); count 1.) We agree.

1. Standard of Review and Applicable Legal Principles

When a criminal defendant claims insufficient evidence supports a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence from which a reasonable trier of fact could have found the defendant guilty of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) In reviewing the record for substantial evidence, we view the evidence in the light most favorable to the judgment and presume in support of the judgment every fact the trier could reasonably deduce from the evidence. (*Ibid.*) To be “substantial,” evidence must be “‘of ponderable legal significance . . . reasonable in nature, credible, and of solid value.’” (*Ibid.*) “[S]ubstantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom.” (*Roy v. Superior Court* (2011) 198 Cal.App.4th 1337, 1349.) A conviction will not be reversed based on insufficient evidence “unless it appears ‘that upon no hypothesis whatever’” does substantial evidence support the conviction. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Section 186.22, subdivision (a) criminalizes active gang participation by punishing “[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in, or have engaged in, a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang” Active gang participation has three elements: “First, active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; second, knowledge that the gang’s members engage in or have engaged in a pattern of criminal gang activity; *and third, the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang.*” (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130 (*Rodriguez*), italics added.)

The third element requires the prosecution to show that felonious criminal conduct was committed by at two least members of the same gang, “one of whom can include the defendant if he is a gang member.” (*Rodriguez, supra*, 55 Cal.App.4th at p. 1132.) Thus, if the defendant charged with active gang participation is a gang member, “to satisfy the third element, a defendant must willfully advance, encourage, contribute to, or help” *at least one other member of his gang* commit felonious criminal conduct. (*Ibid.*) Because section 186.22, subdivision (a) punishes “any” felonious conduct committed in concert by two or more gang members, the felonious criminal conduct underlying active gang participation does not have to be gang-related, or committed for the benefit of a gang. (*People v. Albillar* (2010) 51 Cal.4th 47, 54-56.)

“One may promote, further, or assist in the felonious conduct by at least two gang members by either (1) directly perpetrating the felony with gang members or (2) aiding and abetting gang members in the commission of the felony.” (*People v. Johnson* (2014) 229 Cal.App.4th 910, 920-921 (*Johnson*).) In sum, active gang participation punishes “active participants for commission of [felonious] criminal acts done *collectively* with gang members.” (*Rodriguez, supra*, 55 Cal.4th at p. 1139.)

2. Analysis

Patterson does not challenge the sufficiency of the evidence that (1) No Cutz was a criminal street gang or that (2) he was an active member of the No Cutz gang at the time of the August 19, 2017, police pursuit. Rather, he claims only that insufficient evidence supports the third element of his active gang participation conviction, for two reasons. First, he claims insufficient evidence shows Streeter was a member of the No Cutz gang on August 19, 2017; thus, he claims, there is insufficient evidence that any felonious criminal conduct was committed by at least two gang members. Second, he claims insufficient evidence shows he either directly perpetrated or aided and abetted Streeter in committing any felonious criminal conduct.

For purposes of Patterson’s claim, we assume without determining that both Streeter and Patterson were members of the No Cutz gang at the time of the August 19, 2017, police pursuit. But even so, the record contains insufficient evidence that Patterson either directly perpetrated or aided and abetted Streeter in committing any felonious criminal conduct—more specifically, in possessing either the firearm found in Streeter’s

waistband or the second firearm found on the driver's seat of the BMW after Patterson, then Streeter, got out of the BMW and attempted to flee. For this reason alone, insufficient evidence supports Patterson's active gang participation conviction.

The jury was instructed on active gang participation pursuant to CALCRIM No. 1400. The instruction told the jury that "[f]elonious criminal conduct means committing or attempting to commit any of the following crimes: [¶] [1] Felon in possession of a firearm. [¶] [2] Carrying a loaded weapon in a vehicle. [¶] [3] Carrying a loaded weapon while a gang member. [¶] [4] Evading the police with willful and wanton disregard for public safety. [¶] To decide whether a member of a gang or the defendants committed [any of these crimes], please refer to the separate instructions . . . on those crimes. [¶] To prove that the defendant aided and abetted felonious criminal conduct by a member of the gang, the People must prove that: [¶] One, a member of the gang committed the crime. [¶] Two, defendant knew that the gang member intended to commit the crime. [¶] And, three, before or during the commission of the crime, defendant intended [t]o aid and abet the gang member in committing the crime. [¶] And, four, defendant's words or conduct did, in fact, aid and abet the commission of the crime. [¶] Someone aids and abets in a crime if he or she knows of the perpetrator's unlawful purpose, and he or she specifically intends to and, in fact, aids, facilitates, promotes, encourages, or instigates, the perpetrator's commission of that crime. [¶] If you conclude that the defendant was present at the scene of the crime or failed to prevent the crime, you may consider that in determining whether the defendant was an aider and

abettor. However, the fact that the defendant is present at the scene of the crime or fails to prevent the crime does not by itself make him or her an aider and abettor.”

As CALCRIM No. 1400 reflects, the willful promotion, furtherance, or assistance in felonious criminal conduct by gang members (§ 186.22, subd. (a)) means essentially the same thing as aiding and abetting. (*People v. Casteneda* (2000) 23 Cal.4th 743, 749-750.) “[S]ection 186.22[, subdivision] (a) limits liability to those who promote further, or assist a specific felony committed by gang members and who know of the gang’s pattern of criminal gang activity. Thus, a person who violates section 186.22[, subdivision] (a) has also aided and abetted a separate felony offense committed by gang members” (*Id.* at p. 749; accord, *Johnson, supra*, 229 Cal.App.4th at pp. 920-921.)

The People agree that Patterson did not *directly perpetrate* any of the offenses that were listed in CALCRIM No. 1400 and upon which the jury was instructed it could find Patterson guilty of active gang participation. Indeed, no evidence shows Patterson was driving the BMW during the police pursuit, had a firearm on his person, or that the BMW, in which a firearm was found on the driver’s seat, was at any time under Patterson’s control or direction.⁶ Rather, the People claim Patterson aided and abetted

⁶ To find that Patterson directly perpetrated count 2, which charged Patterson and Streeter with unlawfully carrying a concealed firearm within a vehicle (§ 25400, subd. (a)(1)), the jury had to find Patterson “carried within a vehicle a firearm capable of being concealed on the person,” “knew the firearm was in the vehicle,” the firearm “was substantially concealed within the vehicle,” and “[t]he vehicle was under the defendant’s control or direction.” (CALCRIM No. 2521.)

To find that Patterson directly perpetrated count 4, which charged Patterson with being a felon in possession of a firearm, the jury had to find Patterson “possessed a firearm,” “knew that he possessed the firearm,” and “had previously been convicted of a

Streeter in “the unlawful possession of guns by felons and concealing those weapons.”

Thus, the People claim Patterson aided and abetted Streeter either in (1) possessing the firearm found in Streeter’s waistband or in (2) carrying the second firearm found on the driver’s seat of the BMW.

But no evidence shows Patterson *did or said anything* to “aid, facilitate, promote, encourage, or instigate” Streeter in possessing either the firearm found in Streeter’s waistband or in carrying in the BMW the second firearm found on the driver’s seat of the

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felony.” (CALCRIM No. 2510.) This instruction also told the jury the People were alleging that Patterson possessed the “Ruger P85 9mm,” which was the firearm found on the BMW’s driver’s seat.

BMW.⁷ (CALCRIM No. 1400.) Patterson’s fingerprints were not found on either firearm, and the officers who followed the BMW did not see Patterson handle either firearm during the police pursuit. Seconds after the BMW crashed, Patterson got out of the BMW and ran, but no evidence shows Patterson knew, before he got into the BMW with Streeter, that Streeter had a firearm in his waistband or that there was a second firearm in the BMW, and no evidence shows Patterson handled either firearm before he got into the BMW with Streeter.

Officer Medina’s expert gang testimony is insufficient, standing alone, to support Patterson’s active gang participation conviction. The officer testified that, in the gang culture, gang members typically know when a fellow gang member is in possession of a firearm. And, in response to a hypothetical question based on the evidence of the police pursuit and that the BMW’s driver and passenger were gang members, the officer opined that the passenger, by attempting to flee after the BMW crashed, *specifically intended* to promote, further, or assist in criminal conduct by gang members, and “assisted” in the crimes of evading the police and possessing and concealing the two firearms, “as far as he didn’t stay.” The officer reasoned, “[I]f there wasn’t knowledge of the firearms being in the car and . . . that person was not the one driving the car, why would you flee?” But Patterson’s flight, act of fleeing from the BMW after it crashed, did nothing to “aid,

⁷ In addition, no evidence shows Patterson did anything to aid or abet Streeter in evading the police during the police pursuit. (Veh. Code, § 2800.2; count 5.)

facilitate, promote, encourage, or instigate” Streeter in possessing either firearm or in concealing either firearm in the BMW. (CALCRIM No. 1400.)

The People argue it is reasonable to infer that Patterson “was in control of the second gun before he fled the car.” They argue Patterson’s flight from the BMW shows he was “attempting to distance himself *from evidence linking him to criminal activity . . .*” (Italics added.) But again, no evidence shows Patterson was ever in control of the firearm found on the driver’s seat of the BMW, or that Patterson said or did anything to “aid, facilitate, promote, encourage or instigate” Streeter in carrying or concealing that firearm in the BMW. (CALCRIM No. 1400.)

Patterson’s flight from the BMW, in and of itself, is insufficient to support his active gang participation conviction (§ 1127c), and the jury was accordingly instructed that “evidence that the defendant fled cannot prove guilt by itself.” (CALCRIM No. 372.) Likewise, a defendant’s mere presence at the scene of a crime is insufficient to sustain a conviction for the crime. (*People v. Miranda* (2011) 192 Cal.App.4th 398, 407.) Rather, mere presence is “a circumstance to consider together with the accused’s companionship *and his conduct before and after the offense,*” in determining whether the accused was a principal in the commission of the crime. (*People v. Laster* (1971) 18 Cal.App.3d 381, 388, italics added.)⁸

⁸ Section 31 provides: “All persons concerned in the commission of a crime . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, . . . are principals in any crime so committed.”

Patterson's only conduct was to ride as a passenger with Streeter in the BMW *and* to flee on foot after the BMW crashed. But Patterson's mere presence as a passenger in the BMW, coupled with flight after the BMW crashed, do not support a reasonable inference that Patterson directly perpetrated the possession or aided and abetted Streeter in possessing or concealing either the firearm found in Streeter's waistband, or the firearm found on the driver's seat of the BMW. Although the prosecutor stressed to the jury that there were "[t]wo gangsters" and "two guns," and argued Patterson was in possession of the gun found on the driver's seat, no evidence shows Patterson directly possessed or concealed or aided and abetted Streeter in possessing or concealing either firearm.

Johnson is instructive. The defendant, a juvenile gang member, was stopped by police while walking to a nightclub with two of his fellow gang members, and was found in possession of a loaded firearm. (*Johnson, supra*, 229 Cal.App.4th at pp. 912-913, 921-922.) The defendant already had the gun in his possession when he joined his fellow gang members, and there was no evidence that the defendant had involved his fellow gang members in his acquisition of the gun, or that his fellow gang members had exercised any dominion or control over the gun. (*Id.* p. 922.) A jury convicted the defendant of active gang participation (*id.* at p. 912), but the conviction was reversed on appeal for insufficient evidence (*id.* at p. 922). The *Johnson* court reasoned that the evidence "did not adequately demonstrate" that the defendant possessed the firearm and

ammunition “in tandem with another gang member.” (*Ibid.*) Similarly here, no evidence shows Patterson aided and abetted Streeter in possessing any firearm.

Johnson is further instructive in that it rejected the People’s argument that the defendant’s possession of the loaded firearm prepared him and his fellow gang members “to use lethal force *if* they encountered” rival gang members. (*Johnson, supra*, 229 Cal.App.4th at p. 923.) The court reasoned that active gang participation “‘requir[es] the promotion or furtherance of *specific conduct* of gang members and not inchoate future conduct.’” (*Ibid.*, citing *Rodriguez, supra*, 55 Cal.4th at p. 1137 & *People v. Casteneda, supra*, 23 Cal.4th at p. 749.) The People’s argument in *Johnson* is similar to their argument here that “[h]aving the guns in the [BMW] meant that the guns were readily available for use for protection and intimidation,” and their further argument that possession of the two firearms allowed Streeter and Patterson to “brag about their crimes, thereby increasing their reputations.”

The *Johnson* court reversed a second active gang participation conviction based on a second incident in which the defendant possessed a loaded firearm. (*Johnson, supra*, 229 Cal.App.4th at pp. 915-917, 923.) In the second incident, as in the first, no evidence showed the defendant procured the loaded firearm with the assistance of any other gang member, that another gang member exercised dominion or control over the loaded firearm the defendant possessed, or that the defendant aided and abetted another gang member in the commission of a different felony. (*Id.* at p. 923.) Similarly here, insufficient evidence shows Patterson acted in concert with Streeter, or aided and abetted

Streeter, in committing any felonious criminal conduct on August 19, 2017. (*Rodriguez, supra*, 55 Cal.4th at pp. 1132, 1139.)

B. Streeter's Claims of Sentencing Error

1. Streeter's Section 654 Claim Lacks Merit

(a) *Relevant Background*

The court originally sentenced Streeter to four years four months in state prison, comprised of the upper term of three years on count 3 (Pen. Code, § 29800, subd. (a)(1) [possessing a firearm as a felon]), plus two consecutive eight-month terms (one-third the middle term of two years) on counts 2 and 5 (Pen. Code, § 25400, subd. (a)(1) [carrying a concealed firearm in a vehicle], count 2; Veh. Code, § 2800.2, subd. (a) [evading a policy officer with wanton disregard for safety], count 5). Over Streeter's objection, the court ruled that counts 2 and 3 were not subject to section 654's prohibition against multiple punishment. Streeter's original sentence was later modified to three years eight months in state prison—again comprised of the upper term of three years on count 3, plus eight months on count 5, but rather than a consecutive felony sentence on count 2, the court treated count 2 as a misdemeanor and imposed a concurrent 365-day county jail term on that count.⁹

⁹ In modifying Streeter's sentence, the court said it had noticed an error in Streeter's original sentence on count 2. The court concluded that because the jury found the gang enhancement allegation not true in count 2, count 2 should not have been treated as a felony but as a misdemeanor punishable by a maximum one-year term in county jail. The People did not object to treating Streeter's conviction in count 2 as a misdemeanor. (See § 25400, subd. (c).)

(b) *Analysis*

Streeter claims the trial court erroneously refused to stay his 365-day jail term on count 2 in light of his three-year sentence on count 3. He claims section 654 bars separate punishment on count 2 because counts 2 and 3 are based on his “single physical act” of carrying the firearm found in his waistband. We disagree.

Section 654 prohibits multiple punishment for two or more convictions if the convictions are based on “a single physical act.”¹⁰ (*People v. Corpening* (2016) 2 Cal.5th 307, 311 [“[I]f the different crimes were completed by a ‘single physical act’ . . . the defendant may not be punished more than once for that act.”]; *People v. Jones* (2012) 54 Cal.4th 350, 352, 358-360 [§ 654 bars multiple punishment for convictions based on the “single physical act” of possessing one firearm].)

On the other hand, a defendant may be separately punished for convictions based on the defendant’s simultaneous possession of multiple firearms. (*People v. Sanders* (2012) 55 Cal.4th 731, 745; *People v. Correa* (2012) 54 Cal.4th 331, 341-342.) On appeal, we review de novo the legal question of whether section 654 applies, but we defer to the court’s factual findings, including the court’s implied findings, if substantial evidence supports the findings. (*People v. Valli* (2010) 187 Cal.App.4th 786, 794; *People v. Mejia* (2017) 9 Cal.App.5th 1036, 1045.)

¹⁰ Section 654, subdivision (a) provides, in relevant part, that: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.”

Here, Streeter’s section 654 claim fails because substantial evidence supports the court’s implied finding that Streeter was convicted in count 2 based on his act of possessing a firearm in his waistband and its additional implied finding that Streeter was convicted in count 3 based on his *separate act* of carrying a *second firearm* in the BMW. Indeed, two firearms were found: one firearm, a Ruger LCP .380 subcompact, was found in Streeter’s waistband, and a second firearm, a nine-millimeter Ruger P95, was found on the BMW’s driver’s seat.

Additionally, for purposes of count 2, all of the evidence showed that Streeter was driving the BMW, and substantial evidence also shows (1) Streeter knew the Ruger P95 was in the BMW, (2) the Ruger P95 was substantially concealed in the BMW, and (3) the BMW was under Streeter’s direction and control. (CALCRIM No. 2521.)¹¹ For purposes of count 3, substantial evidence shows Streeter (1) possessed the other firearm found in his waistband, (2) knew the other firearm was in his waistband, and (3) had a previous felony conviction. (CALCRIM No. 2510.)¹²

¹¹ The jury was instructed pursuant to CALCRIM No. 2521 that both defendants were charged in count 2 “with unlawfully carrying a concealed firearm within a vehicle.” This instruction told the jury that, to prove this crime, the People had to prove “[t]he defendant carried within a vehicle a firearm capable of being concealed on the person”; “[t]he defendant knew the firearm was in the vehicle”; “[t]he firearm was substantially concealed within the vehicle”; and “[t]he vehicle was under the defendant’s control or direction.”

¹² The jury was instructed pursuant to CALCRIM No. 2510 that Streeter was charged in count 3 with possessing a firearm as a felon. This instruction told the jury the People were alleging Streeter possessed two firearms, the “Ruger P[9]5 9mm” (found on the driver’s seat) and the “Ruger .380” (found in Streeter’s waistband), and that the jury could not find Streeter guilty in count 3 unless it unanimously agreed which firearm he

Streeter argues the jury must have convicted him in counts 2 and 3 based solely on his “single physical act” of possessing the firearm found in his waistband because the prosecutor repeatedly stressed to the jury that there were “[t]wo gangsters” and “two guns,” and the prosecutor claimed that *only* Patterson, and not Streeter, constructively possessed the gun found on the BMW’s driver’s seat. Indeed, the prosecutor urged the jury to convict Streeter on counts 2 and 3 based solely on the firearm found in Streeter’s waistband. But in light of the entire record, including all of the evidence and the instructions in counts 2, 3, and 4, it is reasonable to conclude the jury convicted Streeter in count 2 based on the firearm found on the BMW’s driver’s seat and convicted Streeter in count 3 based on the firearm found in Streeter’s waistband.

Streeter argues insufficient evidence connected *him* to the firearm found on the BMW’s driver’s seat, but we disagree. As discussed, all of the evidence shows Streeter was driving the BMW and that the BMW was consistently under Streeter’s direction and control. Streeter’s argument that there is “no basis” to conclude the jury “somehow unanimously found beyond a reasonable doubt” that Streeter possessed the gun found on the BMW’s driver’s seat defies the evidence and the instructions.

For all of these reasons, substantial evidence supports the court’s implied finding that Streeter was convicted in count 3 based on his possession of the firearm found in his

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possessed. Patterson was separately charged in count 4 with possessing a firearm as a felon, and in this count the jury was instructed that the People were alleging Patterson possessed only the gun found on the driver’s seat.

waistband and was convicted in count 2 based on the firearm found on the BMW's driver's seat. Thus, Streeter's convictions in counts 2 and 3 are based on separate acts, and the multiple punishment was properly imposed and not stayed on count 2.

2. Streeter's \$4,500 Restitution and Parole Revocation Fines Must Be Reduced

Streeter claims the trial court abused its discretion in imposing a \$4,500 restitution fine (§ 1202.4, subd. (b)) and imposing but suspending a corresponding \$4,500 parole revocation fine (§ 1202.45, subd. (a) [parole revocation fine must be same amount as restitution fine]).

Streeter claims both fines must be reduced to \$1,800 in light of his resentencing on count 2 and the reduction in the number of his felony convictions from three to two. He also claims his defense counsel rendered ineffective assistance in failing to ask the court to recalculate the fines when he was resentenced. For the reasons we explain, we reduce the fines to \$1,950.

(a) *Relevant Background*

The probation report included a recommendation to order Streeter to pay a \$4,500 restitution fine (§ 1202.4, subd. (b)) and a \$4,500 parole revocation restitution fine, and to suspend the latter fine pending Streeter's successful completion of parole, whereupon the latter fine would be permanently stayed (§ 1202.45, subd. (a)). At Streeter's original sentencing hearing, the court imposed the recommended \$4,500 fines and suspended the parole revocation fine. Streeter's defense counsel did not object to the amount of the fines.

The \$4,500 fines were ostensibly calculated pursuant to the discretionary formula set forth in section 1202.4, subdivision (b)—that is, by multiplying the minimum felony restitution fine of \$300, times “3” for the number of felonies Streeter stood convicted of at his original sentencing hearing (counts 2, 3, and 5), times “5” for the number of years of imprisonment Streeter was ordered to serve (four years four months, rounded up to five) ($\$300 \times 3 \times 5 = \$4,500$). (See § 1204.4, subd. (b).)¹³

When the court modified Streeter’s sentence—after the court determined it should have treated count 2 as a misdemeanor rather than a felony—the court did not reduce the \$4,500 fines to reflect that Streeter had two felony convictions instead of three, and one misdemeanor conviction. At resentencing, Streeter’s counsel did not ask the court to reduce the fines by any amount.

(b) *Analysis*

Streeter claims the court abused its discretion in failing to reduce his \$4,500 fines to \$1,800 at resentencing. He arrives at the \$1,800 figure by multiplying the minimum

¹³ Section 1202.4, subdivision (b) provides: “In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record. [¶] (1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense. If the person is convicted of a felony, the fine shall not be less than three hundred dollars (\$300) and not more than ten thousand dollars (\$10,000). If the person is convicted of a misdemeanor, the fine shall not be less than one hundred fifty dollars (\$150) and not more than one thousand dollars (\$1,000). [¶] (2) In setting a felony restitution fine, the court may determine the amount of the fine as the product of the minimum fine pursuant to paragraph (1) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted.”

felony restitution fine of \$300 times “2” for the number of felonies he stood convicted of at resentencing (counts 3 and 5), times “3” for the number of years he was ordered to serve at resentencing (three years eight months, rounded down to three) ($\$300 \times 2 \times 3 = \$1,800$.) In calculating the \$1,800 fines, he disregards his misdemeanor conviction in count 2. (§ 1202.4, subd. (b)(1) [minimum restitution fine for misdemeanor is \$150].)

The People argue, and we agree, that Streeter has forfeited his right to claim on appeal that his \$4,500 fines should have been reduced, given that his counsel did not ask the court to reduce the fines. (*People v. Nelson* (2011) 51 Cal.4th 198, 227.) Still, we agree that Streeter’s defense counsel was ineffective in failing to ask the court to reduce his fines at resentencing, and the deficiency was prejudicial.

To prevail on an ineffective assistance of counsel claim, a defendant must show his (1) counsel’s performance was below an objective standard of reasonableness under prevailing professional norms, and (2) resulting prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.) To show prejudice, the defendant must show a reasonable probability that he or she would have realized a more favorable result absent his counsel’s deficient performance.

(*Strickland v. Washington, supra*, at p. 694; *People v. Ledesma, supra*, at pp. 217-218.)

Because the court used the section 1202.4, subdivision (b) formula in calculating Streeter’s \$4,500 fines in originally sentencing Streeter, it is reasonably probable that the court would have reduced the fines at resentencing, if the question of recalculating the fines had been brought to the court’s attention. Streeter’s defense counsel should have

recognized this, and thus rendered ineffective assistance in failing to ask the court to reduce the fines.

On this point, *People v. Le* (2006) 136 Cal.App.4th 925 is instructive. There, the trial court erroneously calculated the defendant's fines using the section 1202.4 formula by including in the formula a felony conviction and sentence, although the felony sentence should have been stayed. (*People v. Le, supra*, at pp. 932-934.) The defendant argued his counsel was ineffective in failing to bring the formula calculation error to the court's attention. (*Id.* at p. 935.) The People in *Le* argued, as they do here, that the defendant could not show prejudice because the court had discretion to impose restitution and parole revocation fines of up to \$10,000. (*Ibid.*; § 1202.4, subd. (b)(1).)

The *Le* court acknowledged that the trial court had discretion not to use the section 1202.4 subdivision (b) formula and to impose the same fines, but reasoned that, because the trial court used the formula in calculating the fines, it was "reasonably probable" that the court "would have imposed a smaller restitution fine (and thus a smaller corresponding parole revocation fine)" had trial counsel objected to the court's error in calculating the fines under the statutory formula. (*People v. Le, supra*, 136 Cal.App.4th at p. 935.) The *Le* court reduced the defendant's fines to the correct amount under the statutory formula. (*Id.* at pp. 935-936.) Here too, the court ostensibly used the section 1202.4, subdivision (b) formula in calculating Streeter's \$4,500 fines, and it is reasonably probable that the court would have reduced the fines if Streeter's counsel had asked the court to do so using the statutory formula at resentencing, considering that, at

resentencing, the court treated count 2 as a misdemeanor rather than a felony and modified Streeter's sentence accordingly.¹⁴

We disagree, however, with Streeter that \$1,800 is the correct amount of the fines under the section 1202.4, subdivision (b) formula. The correct amount is \$1,950, calculated by multiplying the minimum felony restitution fine of \$300, times “2” for the number of felonies Streeter stood convicted of at resentencing (counts 3 and 5), times “3” for the number of years of imprisonment Streeter was ordered to serve at resentencing (three years eight months, rounded down to three), plus \$150 for Streeter's misdemeanor conviction in count 2 ($\$300 \times 2 \times 3 = \$1,800 + \$150 = \$1,950$).

IV. DISPOSITION

The judgment against Patterson is reversed. The judgment against Streeter is modified to reduce the restitution and parole revocation fines from \$4,500 to \$1,950. (§§ 12024, subd. (b), 1202.45, subd. (a).) The matter is remanded to the trial court with directions to prepare a supplemental sentencing minute order and amended abstract of judgment reflecting this modification, and to forward a copy of the amended abstract of

¹⁴ The People argue this case is distinguishable from *Le* because in *Le* the record “showed” that the trial court used the discretionary section 1204.4, subdivision (b) formula, and in this case, the “record . . . is silent” concerning the court's reasons for imposing the \$4,500 restitution fine. It is clear to us that the court used the statutory formula in calculating the \$4,500 restitution fine, because \$4,500 was the minimum restitution fine under the statutory formula when Streeter was originally sentenced, and the court did not indicate it was imposing a restitution fine in excess of the statutory minimum, based on the factors set forth in section 1202.4, subdivision (d).

judgment to the Department of Corrections and Rehabilitation. The judgment against Streeter is affirmed in all other respects.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

FIELDS

J.

We concur:

CODRINGTON

Acting P. J.

RAPHAEL

J.